

EXHIBIT B
(to Western Industries, Inc.'s Cross-Claim)

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 8 Attorneys for Defendants, BERNZOMATIC, an Unincorporated Division
 9 of Irwin Industrial Tool Company and THE HOME DEPOT, INC.

10
 11 UNITED STATES DISTRICT COURT
 12
 13 NORTHERN DISTRICT OF CALIFORNIA

14 ANDREW SHALABY, an individual,) CASE NO. C 06 7026 EDL
 15 and SONIA DUNN-RUIZ, an)
 16 individual,) Magistrate Judge Elizabeth D.
 17) LaPorte
 18 Plaintiffs,)
 19 v.) ANSWER TO FIRST AMENDED
 20) COMPLAINT BY BERNZOMATIC AND
 21) THE HOME DEPOT, INC.
 22 IRWIN INDUSTRIAL TOOL COMPANY)
 23 and THE HOME DEPOT, INC. and)
 24 DOES 2 through 100, inclusive,)
 25 Defendants.)
 26 _____)

27
 28 COME NOW, Defendants, Bernzomatic, an Unincorporated Division
 29 of Irwin Industrial Tool Company, and The Home Depot, Inc., and
 30 answer the First Amended Complaint of Andrew Shalaby and Sonia
 31 Dunn-Ruiz on file herein by admitting, denying and alleging as
 32 follows:

33 **JURISDICTION AND VENUE**

34 1. Answering paragraph 1, Defendants are without sufficient
 35 knowledge or information to form a belief as to the truth of the
 36 allegations contained in said paragraph, and on that basis, deny
 37 each and every allegation contained therein.

1 2. In response to paragraph 2, Defendants admit all
2 allegations contained therein.

3 3. In response to paragraph 3, Defendants admit all
4 allegations contained therein.

5 4. In response to paragraph 4, Defendants admit that
6 Defendant The Home Depot, Inc. is, and at all times relevant was,
7 a corporation organized and existing under the laws of the State
8 of Delaware, with its principal place of business in Atlanta,
9 Georgia. Defendants admit that The Home Depot, Inc., is a retail
10 seller of hardware, appliances, building materials, gardening
11 materials, and other home improvement supplies, and that it
12 operates stores throughout the United States, including
13 California, with stores in the cities of Emeryville (Alameda
14 County) and El Cerrito (Contra Costa County), California.
15 Defendants further admit that The Home Depot, Inc., sells, among
16 other things Bernzomatic brand MAPP Gas torches. Home Depot
17 U.S.A., Inc., is an indirect and principal operating subsidiary of
18 Defendant The Home Depot, Inc. Defendants deny each and every
19 remaining allegation of paragraph 4, except for those allegations
20 which are expressly admitted above.

21 5. In response to paragraph 5, Defendants are without
22 sufficient knowledge or information to form a belief as to the
23 truth of the allegations contained in said paragraph, and on that
24 basis, deny each and every allegations contained therein.

25 6. In response to paragraph 6, Defendants are without
26 sufficient knowledge or information to form a belief as to the
27 truth of the allegations contained in said paragraph, and on that
28 basis, deny each and every allegations contained therein.

1 7. In response to paragraph 7, Defendants admit all
2 allegations contained therein.

3 8. In response to paragraph 8, Defendants admit all
4 allegations contained therein.

5

6

FACTUAL ALLEGATIONS

7 9. In response to paragraph 9, Defendants admit the flame
8 from a Bernzomatic MAPP Gas torch is intended to be used for
9 soldering, welding, and other purposes that are described on the
10 cylinder labels, on Bernzomatic internet website:
11 <http://www.Bernzomatic.com> and in other product-related
12 instructions and promotional materials. Defendants deny all
13 remaining allegations of paragraph 9 on the basis that Defendants
14 are without sufficient knowledge or information to form a belief
15 as to the truth of the remaining allegations contained in said
16 paragraph, and on that basis deny each and every remaining
17 allegation contained therein.

18 10. In response to paragraph 10, Defendants admit all
19 allegations contained therein.

20 11. In response to paragraph 11, Defendants are without
21 sufficient knowledge or information to form a belief as to the
22 truth of the allegations contained in said paragraph, and on that
23 basis, deny each and every allegations contained therein.

24 12. In response to paragraph 12, Defendants are without
25 sufficient knowledge or information to form a belief as to the
26 truth of the allegations contained in said paragraph, and on that
27 basis, deny each and every allegations contained therein.

28 13. In response to paragraph 13, Defendants are without

1 sufficient knowledge or information to form a belief as to the
2 truth of the allegations contained in said paragraph, and on that
3 basis, deny each and every allegations contained therein.

4 14. In response to paragraph 14, Defendants admit that MAPP
5 Gas torch kits contained a written representation that, among
6 other things, one of the intended and/or acceptable uses of the
7 torches was for "lighting grills." Defendants deny each and every
8 remaining allegation contained in paragraph 14, except for the
9 allegation expressly admitted above.

10 15. In response to paragraph 15, Defendants admit that
11 neither torches nor MAPP Gas cylinders sold by Defendants
12 contained a warning against using their torches to ignite a wood
13 campfire. Defendants deny each and every remaining allegation
14 contained in paragraph 15, except for the allegation expressly
15 admitted above.

16 16. In response to paragraph 16, Defendants deny each and
17 every allegation contained therein.

18 17. In response to paragraph 17, Defendants deny each and
19 every allegation contained therein.

20 18. In response to paragraph 18, Defendants are without
21 sufficient knowledge or information to form a belief as to the
22 truth of the allegation contained in said paragraph, and on that
23 basis, deny each and every allegation contained therein.

24 19. In response to paragraph 19, Defendants admit all
25 allegations contained therein.

26 20. In response to paragraph 20, Defendants admit that, on
27 or about the evening of April 21, 2006, Mr. Shalaby was seriously
28 injured. Defendants deny each and every remaining allegation

1 contained in paragraph 20, except for the allegation expressly
2 admitted above.

3 21. In response to paragraph 21, Defendants are without
4 sufficient knowledge or information to form a belief as to the
5 truth of the allegations contained in said paragraph, and on that
6 basis, deny each and every allegation contained therein.

7 22. In response to paragraph 22, Defendants are without
8 sufficient knowledge or information to form a belief as to the
9 truth of the allegations contained in said paragraph, and on that
10 basis, deny each and every allegation contained therein.

11 23. In response to paragraph 23, Defendants are without
12 sufficient knowledge or information to form a belief as to the
13 truth of the allegations contained in said paragraph, and on that
14 basis, deny each and every allegation contained therein.

15 24. In response to paragraph 24, Defendants are without
16 sufficient knowledge or information to form a belief as to the
17 truth of the allegations contained in said paragraph, and on that
18 basis, deny each and every allegation contained therein.

19 25. In response to paragraph 25, Defendants are without
20 sufficient knowledge or information to form a belief as to the
21 truth of the allegations contained in said paragraph, and on that
22 basis, deny each and every allegation contained therein.

23

24 **FIRST CAUSE OF ACTION - STRICT PRODUCTS LIABILITY**

25 **(By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)**

26 26. Defendants incorporate by this reference the responses
27 contained in paragraphs 1 through 25 above, as though fully set
28 forth herein.

1 27. In response to paragraph 27, Defendants deny each and
2 every allegation contained therein.

3 28. In response to paragraph 28, Defendants deny each and
4 every allegation contained therein.

5 29. In response to paragraph 29, Defendants deny each and
6 every allegation contained therein.

7 30. In response to paragraph 30, Defendants admit that
8 Defendant, Irwin Industrial Tool Company designed, manufactured,
9 distributed, and marketed MAPP Gas torches under the "Bernzomatic"
10 brand name. Defendants admit that Irwin Industrial Tool Company
11 distributed and marketed MAPP Gas cylinders under the
12 "Bernzomatic" brand name. Defendants admit that The Home Depot,
13 Inc., sold Bernzomatic brand MAPP Gas torches and cylinders.
14 Defendants deny that the Bernzomatic brand torches and/or
15 cylinders contained manufacturing and/or design defects when they
16 left Defendants' possession. Defendants deny any other
17 allegations which may be included or implied in paragraph 30
18 except for those allegations expressly admitted above.

19 31. In response to paragraph 31, Defendants deny each of the
20 allegations contained therein with the exception of the
21 allegations of subparts a. through f., inclusive, which Defendants
22 deny on the basis that Defendants are without sufficient knowledge
23 or information to form a belief as to the truth of the allegations
24 contained in said subparts.

25
26 **SECOND CAUSE OF ACTION - STRICT LIABILITY FOR FAILURE TO WARN**

27 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

28 32. Defendants incorporate by this reference the responses

1 contained in paragraphs 1 through 31 above, as though fully set
2 forth herein.

3 33. In response to paragraph 33, Defendants deny each and
4 every allegation contained therein.

5 34. In response to paragraph 34, Defendants deny each and
6 every allegation contained therein.

7 35. In response to paragraph 35, Defendants deny each and
8 every allegation contained therein.

9 36. In response to paragraph 36, Defendants deny each and
10 every allegation contained therein.

11 37. In response to paragraph 37, Defendants deny each and
12 every allegation contained therein.

13

14 **THIRD CAUSE OF ACTION - NEGLIGENCE**

15 **(By Mr. Shalaby Against Irwin Industrial Tools)**

16 38. Defendants incorporate by this reference the responses
17 contained in paragraphs 1 through 37 above, as though fully set
18 forth herein.

19 39. In response to paragraph 39, Defendant admits that
20 Bernzomatic is a division of Defendant, Irwin Industrial Tool
21 Company, which designed, manufactured, distributed, marketed,
22 and/or sold Bernzomatic brand torches, and distributed and
23 marketed MAPP Gas cylinders. Defendants deny each and every
24 remaining allegation contained in paragraph 39 except for the
25 allegations expressly admitted above.

26 40. In response to paragraph 40, Defendant denies each and
27 every allegation contained therein.

28 41. In response to paragraph 41, Defendant denies each and

1 every allegation contained therein.

2 42. In response to paragraph 42, Defendant denies each and
3 every allegation contained therein.

4

5 **FOURTH CAUSE OF ACTION - NEGLIGENT FAILURE TO WARN**

6 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

7 43. Defendants incorporate by this reference the responses
8 contained in paragraphs 1 through 42 above, as though fully set
9 forth herein.

10 44. In response to paragraph 44, Defendants deny each and
11 every allegation contained therein.

12 45. In response to paragraph 45, Defendants deny each and
13 every allegation contained therein.

14 46. In response to paragraph 46, Defendants deny each and
15 every allegation contained therein.

16 47. In response to paragraph 47, Defendants deny each and
17 every allegation contained therein.

18

19 **FIFTH CAUSE OF ACTION - BREACH OF**

20 **IMPLIED WARRANTY OF MERCHANTABILITY**

21 (By Mr. Shalaby Against Irwin Industrial Tools and Home Depot)

22 48. Defendants incorporate by this reference the responses
23 contained in paragraphs 1 through 47 above, as though fully set
24 forth herein.

25 49. In response to paragraph 49, Defendants deny each and
26 every allegation contained therein.

27 50. In response to paragraph 50, Defendants admit each and
28 every allegation contained therein.

1 51. In response to paragraph 51, Defendants deny each and
2 every allegation contained therein.

3 52. In response to paragraph 52, Defendants deny each and
4 every allegation contained therein.

5 **SIXTH CAUSE OF ACTION - NEGLIGENT INFLICTION**
6 **OF EMOTIONAL DISTRESS**

7 **(By Plaintiffs Against All Defendants)**

8 53. Defendants incorporate by this reference the responses
9 contained in paragraphs 1 through 52 above, as though fully set
10 forth herein.

11 54. In response to paragraph 54, Defendants deny each and
12 every allegation contained therein.

13 55. In response to paragraph 55, Defendants are without
14 sufficient knowledge or information to form a belief as to the
15 truth of the allegations contained in said paragraph, and on that
16 basis, deny each and every allegation contained therein.

17 56. In response to paragraph 56, Defendants deny each and
18 every allegation contained therein.

19 57. In response to paragraph 57, Defendants deny each and
20 every allegation contained therein.

21
22 **FIRST AFFIRMATIVE DEFENSE**

23 58. Plaintiffs' First Amended Complaint herein, and each and
24 every cause of action therein, fails to state facts sufficient to
25 constitute a cause of action against these answering Defendants
26 upon which relief can be predicated.

27 **SECOND AFFIRMATIVE DEFENSE**

28 59. Plaintiffs' injuries and damages, if any, were caused in

1 whole or in part by their own lack of due care, and their recovery
2 herein, if any, should be correspondingly barred or reduced.

3 **THIRD AFFIRMATIVE DEFENSE**

4 60. Plaintiffs' injuries and damages, if any, were caused in
5 whole or in part by the acts and/or omissions of some third party
6 or third parties over whom these answering Defendants had no
7 control and for whose acts and/or omissions these answering
8 Defendants are neither responsible nor liable.

9 **FOURTH AFFIRMATIVE DEFENSE**

10 61. These answering Defendants' liability, if any, for non-
11 economic damages suffered by Plaintiffs shall be several only, and
12 not joint, and Defendants shall only be liable, if at all, for the
13 non-economic damages allocated to them in direct proportion to
14 their percentage of fault, if any, as more fully defined in
15 California Civil Code, Section 1431.2(a), et seq.

16 **FIFTH AFFIRMATIVE DEFENSE**

17 62. At all times relevant hereto, Plaintiffs failed and/or
18 refused to properly mitigate their damages, and their recovery
19 herein, if any, should be correspondingly barred or reduced.

20 **SIXTH AFFIRMATIVE DEFENSE**

21 63. At the time of the incident alleged in the First Amended
22 Complaint on file herein, the product therein described was/had
23 been altered, modified, and/or was in a condition different than
24 that in which it had left the possession of these answering
25 Defendants.

26 **SEVENTH AFFIRMATIVE DEFENSE**

27 64. At the time of the incident alleged in the First Amended
28 Complaint on file herein, the product therein described was/had

1 been damaged, abused, unforeseeably misused, and/or was not
2 properly maintained after it left the possession of these
3 answering Defendants.

4 WHEREFORE, Defendants, Bernzomatic, an Unincorporated
5 Division of Irwin Industrial Tool Company and The Home Depot,
6 Inc., pray judgment on the First Amended Complaint of Andrew
7 Shalaby and Sonia Dunn-Ruiz herein as follows:


8 1. That Plaintiffs take nothing from these answering
9 Defendants by way of their First Amended Complaint herein;

10 2. That these answering Defendants be awarded their costs of
11 suit incurred herein;

12 3. That these answering Defendants be awarded such other and
13 further relief as the Court may deem just and proper.

14 DATED: June 19, 2007

KELLER, PRICE & MOORHEAD

15 
16 J. Phillip Moorhead
17 Attorneys for Defendants,
18 BERNZOMATIC, an Unincorporated
19 Division of Irwin Industrial Tool
20 Company and THE HOME DEPOT, INC.
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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Andrew Shalaby v. Bernzomatic/Home Depot, Inc.
4 CASE NO. C 06 7026 CW

5 **PROOF OF SERVICE**

6 I am employed in the county of Los Angeles, State of
7 California. I am over the age of 18 and not a party to the within
8 action; my business address is 229 Avenue "I", Second Floor,
9 Redondo Beach, California 90277.

10 On June 19, 2007, I served the foregoing document described as
11 **ANSWER TO FIRST AMENDED COMPLAINT** on all interested parties in this
12 action as set forth below:

13 Mark D. Epstein
14 Alborg, Veiluva & Epstein LLP
15 200 Pringle Avenue, Suite 410
16 Walnut Creek, CA 94596
17 (925) 939-9880 FAX (925) 939-9915
18 (Attorneys for Plaintiffs, Andrew Shalaby and Sonia Dunn-Ruiz)

19 FACSIMILE - by use of facsimile machine telephone number
20 (310)540-8480, I served a copy of the within document, to the by
21 facsimile numbers set forth above. The facsimile machine I used
22 complied with California Rules of Court, Rule 2004, and no error
23 was reported by the machine. Pursuant to California Rules of
24 Court, Rule 2006(d), I caused the machine to print a transmission
25 record of the transmission, a copy of which is attached to this
26 Declaration.

27 MAIL - I caused such envelope with postage thereon fully
28 prepaid to be placed in the United States mail at Redondo Beach,
California. I am "readily familiar" with the firm's practice of
collection and processing correspondence for mailing. Under that
practice it would be deposited with the U.S. Postal Service that
same day with postage thereon fully prepaid at Redondo Beach,
California, in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after
date of deposit for mailing in affidavit.

FEDERAL - I declare under penalty of perjury that the
foregoing is true and correct, and that I am employed in the office
of a member of the Bar of this Court at whose direction the service
was made.

Executed on June 19, 2007, at Redondo Beach, California.


Deidre A. Picascia